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No. 83-522

Supreme Court of the United States

October Term, 1983

RAYMOND WALKER,
Cross-Petitioner,

vs.

TED ENGLE, SUPERINTENDENT
Southern Ohio Correctional Facility,
Cross-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR CROSS-RESPONDENT IN OPPOSITION

JAMES R. UNGER
Prosecuting Attorney
Stark County, Ohio

DALE T. EVANS, *Counsel of Record*
Assistant Prosecuting Attorney
Chief, Appellate Division
Courthouse Annex
P. O. Box 167 - D. T. Station
Canton, Ohio 44701
Telephone: (216) 438-0897
Attorneys for Cross-Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-1647

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Cross-Respondent, Ted Engle, Superintendent of the Southern Ohio Correctional Facility, respectfully requests that this Court deny the Cross-Petition for Writ of Certiorari seeking review of the Sixth Circuit's opinion in this case. Said opinion is reported at 703 F.2d 959.

REASON WHY THE WRIT SHOULD BE DENIED

The United States Circuit Court of Appeals for the Sixth Circuit rejected Cross-Petitioner's claim that he should be granted an unconditional discharge. In doing so, the Court upheld the ruling of United States District Judge Thomas, who had concluded that *Jackson v. Virginia*, 443 U.S. 307 (1979), neither required nor permitted such a judgment and freedom from retrial. Judge Thomas opined that apart from what he found to be prejudicial evidence, "the prosecution produced sufficient other evidence which, viewed in the light most favorable to the prosecution, would permit a reasonable trier of fact to find Walker guilty beyond a reasonable doubt." He categorized the jail records as circumstantial evidence of Walker's incarceration at the time of the offense, but noted that their probative value was undermined through proper cross-examination of various jail deputies and inmates.

In doing so, Judge Thomas rejected the recommendation of the United States magistrate for final discharge which Cross-Petitioner urges in his petition before this Court. This ruling was grounded solely on the magistrate's (and now the Cross-Petitioner's) assessment of the credibility of the state's witnesses. This amounts to a usurpation of a function solely reserved to the state court trier of fact. The credibility of witnesses is not a matter subject to review in federal habeas corpus courts. *Pickford v. U.S.*, 518 F.2d 831 (4th Cir. 1975); *Edwards v. Sasser*, 462 F. Supp. 374. This Court recognized this concept in *Jackson v. Virginia*, *supra* (443 U.S. at page 326). Likewise, in *Jackson*, *supra*, this Court affirmed its position taken in *Holland v. U.S.*, 384 U.S. 121, that the prosecution is not under any affirmative duty to rule out every hypothesis except that of guilt be-

yond a reasonable doubt, stating that a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences, must presume (even if it does not affirmatively appear from the record) that the trier of fact resolved the conflict in favor of the prosecution and defer to that resolution (443 U.S. at page 326), and recognized the continued function reserved to the jury, stating with regard to the standard for review, "This familiar standard gives full play to the responsibility of the triers of fact fairly to resolve conflicts in the testimony, to weigh the evidence and to draw reasonable inferences from basic facts to ultimate facts." (443 U.S. at p. 319.)

Cross-Petitioner in his petition attacks the testimony of the two co-defendants who, under strenuous cross-examination steadfastly maintained that Walker was the triggerman, as inherently untrustworthy and questionable by its tardiness. He also attacks the testimony of the third eyewitness, Rene Clark. Like the magistrate, he chooses not to believe these witnesses; but it is quite obvious from the verdict that the jurors did. The magistrate's report, which is the only support for petitioner's position, was replete with statements of his personal opinion on the credibility of these and other witnesses. His Honor Judge Thomas, properly rejected this concept that the federal judiciary may cavalierly substitute its assessment of credibility for that of the twelve jurors who actually saw and heard the witnesses.

In reaching his determination that there was sufficient properly admitted evidence from which a rational trier of fact could find guilt beyond a reasonable doubt, His Honor Judge Thomas reviewed the testimony of co-defendants, Davidson and Ogeltree, and that of Clarence Cash, James Curry, Rene Clark, Mable Mack and Willie Mae Hart, and presumably, all of the evidence, conclud-

ing that a retrial was not prohibited and citing the following from *Jackson v. Virginia, supra*:

> But this inquiry does not require a court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.

The District Judge also reviewed the alibi defense. He then, of course, rejected Cross-Petitioner's ridiculous proposition that jail records, unlike any other alibi evidence, are conclusive and unassailable. The Court noted many discrepancies revealed by cross-examination, finding that the jail records did not provide "conclusive proof" that Walker was in jail on July 22nd and noting that the weight to be assigned to those records and the credibility of the witnesses were for the jury to decide. Cross-Petitioner's arguments are fogged by the same fault as the magistrate, who formed an opinion and then searched the record for support. As Judge Thomas noted, "The magistrate ignored the jury's right to accept all, part or none of the jail record testimony."

The District Court applied the reasoning of the United States District Court for the Eastern District of Wisconsin in *Harris v. Clusen*, 487 F. Supp. 617 (1980), wherein the habeas petitioner had challenged the sufficiency of the evidence under the *Jackson, supra*, standard. That Court, confronted with a similar alibi defense, held:

> Viewing the evidence in this case in the light most favorable to the prosecution, four persons identified the petitioner as the person who committed the armed robbery, and one testified that she saw a gun in petitioner's possession in commission of the robbery. Given the directly contrary testimony of petitioner's witnesses that he was in Chicago at the time, the jury, as the trier of facts, was required to choose

> between believing the prosecution or the petitioner's witnesses and it was entitled to make that choice in the manner in which it did. (487 F. Supp. at pp. 617 to 618.)

In reviewing Judge Thomas's order, the Sixth Circuit noted that the state had placed Walker at the scene of the crime through the testimony of Davidson and Ogeltree, accomplices to the crime; Rene Clark, a disinterested witness; and Mable Mack, wife of the deceased. The state also placed Walker outside the jail during the relevant period through testimony of Clarence Cash, who allegedly spoke with Walker in an after-hours bar during June, 1972; James Curry, who allegedly spoke with Walker at a garage around mid-June; and Mrs. Willie Mae Hart, who resided near the A & P store and who saw a brown automobile leave the scene of the crime driven by a black man with a bad complexion "similar to" Walker's. The Court noted that the magistrate had rejected this testimony and Judge Thomas found that the magistrate had erred by weighing the testimony and failing to view the evidence in a light most favorable to the prosecution, noting that credibility is not a matter of review for federal habeas corpus courts and finding that the testimony of state's witnesses, if believed, would provide sufficient evidence to support the conviction—thus, warranting a retrial.

The position taken by the Sixth Circuit is supported by two recent decisions of this Court. In *Maggio v. Fulford*, 103 S. Ct. 2261 (6/6/83), this Court affirmed that federal habeas corpus courts are not to reject a state court's factual conclusion as not "fairly supported by the record" within the meaning of 28 U.S.C. Section 2254(D)(a) by reassessing the credibility of witnesses who testified in the state proceedings. This Court noted that it was error for the Circuit Court to substitute its own judgment as to the

credibility of witnesses for that of the Louisiana Court's prerogative which 28 U.S.C. Section 2254 does not allow. Going on to state that even if the key witness for the defendant in the state proceedings was "unimpeached," the rejection of his testimony by the state court would not permit a conclusion that the state court's factual findings were not "fairly supported by the record." See also *Marshall v. Lonberger,* 103 S. Ct. 843.

Thus, it is submitted that the Sixth Circuit Court of Appeals was correct in its conclusion that retrial in the instant case is not precluded by *Jackson, supra,* and only usurpation of the credibility determination function of the state trial courts can lead to any other conclusion.

CONCLUSION

It is respectfully submitted that the Cross-Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAMES R. UNGER
Prosecuting Attorney
Stark County, Ohio
DALE T. EVANS, *Counsel of Record*
Assistant Prosecuting Attorney
Chief, Appellate Division
Courthouse Annex
P. O. Box 167 - D. T. Station
Canton, Ohio 44701
Telephone: (216) 438-0897
Attorneys for Cross-Respondent